

July 8, 2005

Kent County - Civil Division (739-7641)

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RE: **Freedom of Information Act Complaint
Against New Castle County Council**

Dear Mr. Abbott:

On April 14, 2005, we received your complaint alleging that the Administrative–Finance Committee (“the Committee”) of the New Castle County Council (“the Council”) violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 (“FOIA”), on April 19, 2005 by: (1) meeting in executive session without giving the required advance notice to the public; (2) failing to follow the proper procedures for going into executive session; and (3) discussing matters in executive session which FOIA requires to be discussed in public.

By letter dated April 18, 2005, we asked the Council to respond to your complaint in writing within ten days. We granted the Council’s counsel a brief extension of time, and received the Council’s response on May 5, 2005.

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According to the Council, a legislative aide posted the notice and agenda for the Committee's April 19, 2005 meeting on April 12, 2005. The agenda listed several ordinances for discussion, including Ordinance 05-028 "Amend the Annual Operating Budget." Under that item, the agenda listed eight proposed decreases in the budget to fund one budget increase in "General Insurance: Legal Fees & Settlements" (\$1,050,000). The agenda went on to explain: "This transfer of funds is required in order to provide sufficient funding for ongoing litigation dealing with employment and land use issues. Funding is available due to savings within the Departments of Administration, Special Services, Police and General Insurance."

The agenda for the Committee's April 19, 2005 meeting also listed under the heading "Other" – "Report of ongoing litigation by the County Attorney." The agenda noted that it "shall be subject to change to include the addition or deletion of items received from Council members, including executive session, which arise at the time of the meeting."

The minutes of the April 19, 2005 meeting show that Councilwoman Venetzky introduced Ordinance 05-028 which "deals with ongoing litigation and Council members will be going into Executive Session. Council decides to move this item to the end of the agenda." The minutes show that later in the meeting "Councilman Weiner made a motion to go into Executive Session for the purpose of discussion [*sic*] litigation strategy related to cases which will be funded by the transfer of funds in this ordinance."

The minutes of the executive session (which the Council provided to us for our *in camera* review) show that after a presentation by the County Attorney, "Councilman Weiner made a motion to come out of Executive Session. It was seconded by President Clark. All were in favor and

Council exited Executive Session.”

Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those” authorized by statute for executive session. 29 *Del. C.* §10004(a).

FOIA authorizes a public body to meet in executive session to discuss “[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.” *Id.* §10004(b)(4).

FOIA requires public bodies to “give public notice of their regular meetings and of their intent to hold an executive session to the public, at least 7 days in advance thereof. . . . [T]he agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.” *Id.* §10004(e)(2).

FOIA requires every public body to “maintain minutes of all meetings, including executive sessions . . . Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.” *Id.* §10004(f).

Legal Analysis

A. Notice of April 19, 2005 Executive Session

“An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997)). “While the statute requires only a ‘general statement’ of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfied neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that that specific important subject will be discussed.” *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.5 (Del. Ch., Aug. 29, 1986) (Allen, C.).

The notice requirements for executive session, however, are less strict because the executive session is closed to the public. FOIA “simply requires public bodies to disclose the purpose of the executive session in the agenda.” *Common Cause of Delaware v. Red Clay Consolidated School District*, C.A. No. 13798, 1995 WL 733401, at p.4 (Del. Ch., Dec. 5, 1998) (Balick, V.C.). For example, FOIA does not require the agenda to “specify what legal, personnel or other subjects are discussed in executive session.” *Id.* See *Att’y Gen. Op.* IB12 (May 21, 2002) (agenda listing “Executive Session to Discuss Personnel” satisfied the agenda requirements of FOIA).

The Committee posted the notice and agenda for its April 19, 2005 on April 12, 2005 seven days in advance as required by FOIA. The agenda listed for discussion in public session Ordinance 05-028 “Amend the Annual Operating Budget.” The agenda did not list any matters for discussion in executive session. Under the last item, “Other,” the agenda listed: “Report on recently completed

financial reviews by the County Administration; Report of ongoing litigation by the County Attorney; and New Castle County Council grant requests.”

The Council maintains that FOIA authorized the Committee to amend its agenda during the April 19, 2005 meeting to go into executive session to discuss the County Attorney’s report about ongoing litigation. FOIA allows a public body “to include additional items including executive session . . . which arise at the time of the public body’s meeting.” 29 *Del. C.* §10004(e)(2). But under FOIA, a matter does not “arise” at a public meeting “by way of a motion to add the issue to the agenda. By that circular logic, there would be no limits on what business could be discussed at the meeting of a public body, so long as the agenda provided that it was subject to change. We have previously cautioned that Section 10004(e)(2) of FOIA must be construed narrowly ‘lest the exception swallow the rule.’” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 03-IB18 (July 31, 2003)).¹

If “a public body knows that an item of public interest will be addressed at a meeting, then it cannot claim, in good faith, that the issue arose at the time of the public body’s meeting in order to circumvent the notice requirements of FOIA.” *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997). The Committee knew when it posted the agenda for its April 19, 2005 meeting that it would hear a report from the County Attorney about ongoing litigation. The Council has not offered any plausible reason why this matter was not noticed in advance for executive session.

¹ “In the event that FOIA permits a public body to add items to the agenda, the proper procedure is for the public body by motion to vote to amend the agenda.” *Att’y Gen. Op.* 03-IB17 (July 31, 2003).

We determine that the Committee violated the open meeting requirements of FOIA because it did not give the public notice in the agenda posted for the April 19, 2005 meeting that the Committee would meet in executive session to discuss litigation strategy. FOIA requires public bodies to give the public notice “of their intent to hold an executive session closed to the public, at least 7 days in advance thereof.” 29 *Del. C.* §10004(e)(2). While the agenda stated that there would be a report by the County Attorney about “ongoing litigation,” the agenda listed it for public session. For reasons explained below, we do not believe that any remediation is necessary for this FOIA violation.

B. Procedures for Going into Executive Session

“If a public body meets to discuss only matters that are authorized for executive session, FOIA still requires that the meeting be noticed to the public. The public have a right to attend the opening of the meeting, to see that the public body follows the required procedures for going into executive session, and to observe the discussion of any public business that follows.” *Att’y Gen. Op.* 02-IB17 (Aug. 6, 2002).

The procedures for going into executive session under FOIA are determined by the requirements for maintaining minutes. The minutes of the public portion of the meeting must reflect that the public body voted to go into executive session with a record “of each vote taken and action agreed upon.” 29 *Del. C.* §10004(f). The minutes of an executive session must record the vote taken to leave executive session and go back into public session. *See Att’y Gen. Op.* 93-IO11 (May

6, 1993).

The Council has provided us with a sworn affidavit of Nellie Manlove, a legislative aide to Councilwoman Venezky, who prepared the minutes of the public portion of the Committee's April 19, 2005 meeting and minutes of the executive session. The affidavit states that during the public portion of the meeting, "Councilman Weiner made a motion to go into Executive Session and stated the purpose: to discuss litigation strategy. The motion was seconded, all were in favor, the public was asked to exit the room, and Council officially went into executive session." The affidavit further states: "At the conclusion of the Executive Session, Councilman Weiner made a motion to come out of Executive Session, the motion was seconded, all were in favor, and Council exited Executive Session."

The minutes of the April 19, 2005 meeting confirm that the Committee followed the proper procedures under FOIA for going into executive session and then returning to public session. We determine that the Committee did not violate the open meeting requirements of FOIA in the manner in which it went into executive session at the meeting on April 19, 2005.

C. Subject Matter of April 19, 2005 Executive Session

"FOIA is a statutory waiver of any possible [attorney-client] privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute." *Att'y Gen. Op. 02-IB12* (May 21, 2002). A public body can consult with an attorney in executive session "with respect to collective bargaining or pending or potential litigation, but only when an open meeting *would have an adverse effect on the bargaining or litigation position* of the public body."

29 *Del. C.* §10004(b)(4) (emphasis added). These limitations were designed “to prevent potential abuse” and do not permit a public body “to hold an executive session to receive legal advice about **any** issue or matter.” *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, C.A. No. 1216-K, 1994 WL 274295, at p. 11 (Del. Ch., May 18, 1994) (Jacobs, V.C.).

You contend that the Committee met in executive session for a purpose not authorized by law on April 19, 2005 because “[i]t is believed that the advisability and justification for the proposed County legislation was discussed, and that decision-making was made by one or more members of County Council during this time frame as to how they would vote on Ordinance No. 05-028.”

We have the benefit of reviewing the minutes of the Committee’s April 19, 2005 executive session *in camera*.² Those minutes show that the County Attorney briefed the Committee about current litigation involving the County to explain why more funds would be necessary to pay for outside legal fees to defend against seventy pending lawsuits. There is no indication in the minutes of the executive session that there was any discussion of the specific budget cuts Ordinance 05-028 might require or how members of the Committee might be inclined to vote on the ordinance.

You contend that the County Attorney’s report would not have had an adverse effect on the bargaining position of the Council in ongoing litigation: “First, the County Council is not a party in many, if any, of the (70) pending legal actions against the County. . . . Second, general issues

² In ascertaining the matters discussed during the Committee’s executive session on April 19, 2005, we refer generally to the contents of minutes of executive session without disclosing any specifics in keeping with our assurances of confidentiality.

regarding case status and funding of litigation costs cannot reasonably be said to have an adverse effect on the litigation position of the County.”

The Council’s response is that the “public body that would be adversely affected by an open discussion of its litigation strategy is the County as a whole, including the legislative branch that approves the budget for payment of legal fees to outside counsel and settlements.”

FOIA’s litigation strategy exemption is designed not just to protect the public body named as a party in a lawsuit, but to protect the citizens whose tax monies may be used to fund the defense of the litigation or settle the case. “[I]f knowledge of litigation strategy, or the amount of settlement offers or of potential claims became public, it would damage the [public body’s] ability to settle or defend those matters and all the citizens would have to bear the cost of that disclosure.” *The Reading Eagle Co. v. Council of the City of Reading*, 627 A.2d 305, 307 (Pa.Cmwlth. 1993). We believe that the Committee had a right under FOIA to obtain confidential legal advice from the County Attorney to decide how to deploy taxpayer monies to defend seventy pending lawsuits, and that public disclosure of that legal advice would have an adverse effect on the litigation position of the County.

In decisions involving the public records requirements of FOIA, we have determined that documents reflecting the expenditure of public funds for outside legal counsel are usually public records. *See Att’y Gen. Op.* 02-IB24 (Oct. 1, 2002) (agreement to settle a sex discrimination claim); *Att’y Gen. Op.* IB16 (July 20, 2002) (letter of engagement with outside legal counsel and billing statements); *Att’y Gen. Op.* 04-IB07 (Mar. 8, 2004) (“FOIA does not exempt the disclosure of information in the billing statements that will enable a citizen to calculate the dollar amounts paid

by the County to Oberly Jennings”).

We believe that other matters relating to outside legal counsel, however, are protected by attorney-client privilege under FOIA. Specific litigation objectives, how much resources to deploy, the legal issues being researched, and parameters for potential settlement are just a few examples of matters which we believe FOIA allows a public body to discuss in private.³ “A basic understanding of the adversary system indicates that certain phases of litigation strategy may be impaired if every discussion is available for the benefit of opposing parties who may have as a purpose a private gain in contravention of the public need” for confidentiality.” *Prior Lake American v. Mader*, 642 N.W.2d 729, 740 (Minn. 2002).

In *Furhman v. Freedom of Information Commission*, 1996 WL 689946 (Conn. Super., Nov. 21, 1996), the town council appropriated funds to hire an environmental consultant and legal counsel to oppose a sediment disposal landfill. At a public town meeting, the council went into executive session to discuss the sediment disposal issue, and when the council returned to public session it approved a supplemental appropriation for legal and consulting fees. The minutes of the executive session showed that the council discussed: (1) the amount of money to be spend on consultants and attorneys and the hiring of a lobbyist; (2) the contents of some prior consultants’ reports; and (3)

³ Although the County Attorney is not legal counsel to the Council, the courts have held that the “litigation strategy” exemption under the state open meeting law applies when a public body meets with the attorney who will be defending the case. “[I]f the Board were required to meet with the insurance company’s lawyer on a specific case, that consultation should not be subject to public scrutiny as an ‘open meeting’ contemplated by the statute.” *Minneapolis Star & Tribune Co. v. Housing and Redevelopment Authority*, 251 N.W.2d 625-26 (Minn. 1976).

legal options of the town including the feasibility of a declaratory judgment action in court, and the appropriate timing of any such filings.

Like Delaware's FOIA, the Connecticut open meeting law authorizes executive session for "strategy and negotiations with respect to pending claims or pending litigation." Conn.Gen.Stat. §1-18a(e)(2). "Strategy is defined as a careful plan or method and the art of devising or employing plans or stratagems toward a goal." *Fuhrman*, 1996 WL 689946, at p.5. The Connecticut Superior Court held that the town council properly met in executive session to discuss litigation strategy.

The Town Council was concerned about the possible effects the disposal of sediment would have on the landfill . . . During the June 1, 1995 executive session, the Town Council considered the possible legal options and responses to the disposal application. The council was considering action to implement legal relief and enforce the town's legal rights. Therefore, the executive session was held for purposes of discussing "pending litigation."

Fuhrman, 1996 WL 689946, at p. 5.

In the past, the Council has retained outside legal counsel to represent the County in a number of pending lawsuits. The Committee met in executive session with the County Attorney on April 19, 2005 to discuss the legal options for defending those lawsuits (*e.g.*, outside vs. in-house counsel) and the costs that might be incurred depending on the choice of strategy. When the Council returned to public session, it voted to amend the budget to provide for \$1,050,000 in funds to pay for legal costs. We believe that public disclosure of the private discussions that led to that public vote "would have an adverse effect on the . . . litigation position of the public body." 29 *Del. C.*

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§10004(b)(4).

Based on the record, we determine that the Committee did not violate FOIA when it met in executive session on April 19, 2005 to discuss litigation strategy as authorized by law.

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Conclusion

For the foregoing reasons, we determine that the Committee did not violate the open meeting requirements of FOIA when it voted to go into executive session at a meeting on April 19, 2005 to discuss litigation strategy as authorized by FOIA for private discussion. We determine that the Committee violated FOIA by not giving notice seven days in advance to the public that the litigation report by the County Attorney to the Committee would be heard in executive session.

We do not believe that any remediation is necessary for this violation because the Committee followed the proper procedures under FOIA for going into executive session, and only discussed matters which FOIA authorizes for discussion by a public body in executive session. If the Committee had given seven days notice to the public of the executive session, the result would not been any different. The Committee could still have lawfully met in executive session to discuss litigation strategy.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

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cc: The Honorable M. Jane Brady
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